No. 21253

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA for the Use and Benefit of FLOATING FLOORS, INC., a corporation,

Appellant,

vs.

FEDERAL INSURANCE COMPANY, a corporation,

Appellee.

On Appeal From the Judgment of the District Court of the United States, Southern District of California, Central Division.

APPELLEE'S RESPONSE TO OPENING BRIEF.

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The Jurisdictional Statement and Statement of the Case, as set forth on pages 1-5 of the appellant's brief, are accepted by the appellee.

QUESTIONS PRESENTED.

1. Was a genuine issue of material fact presented by the various affidavits as to whether appellant had furnished the replacement materials on March 24, 1964, where the affidavits clearly show that the shipment of said materials was made pursuant to an independent contract between Shiff and Commercial?

2. Were genuine issues of material fact presented by the various affidavits as to whether appellant's notice of June 12, 1964, and commencement of suit on March 22, 1965, were timely, where the affidavits clearly show that said notice and commencement of suit were not within ninety days and one year, respectively, of the date upon which the appellant last furnished the materials for which a claim is being made?

SUMMARY OF ARGUMENT.

The March 23, 1964 shipment of replacement materials to Shiff, by Commercial, was not a furnishing of materials by the appellant because the affidavits of both parties show that said shipment took place pursuant to an independent contract between Shiff and Commercial. Because the appellant did not furnish said materials and, because the last furnishing made by the appellant was, at the latest on October 31, 1963, the appellant's notice of June 12, 1964 was not timely and, for that reason, the appellant has no rights under the Miller Act to sue on the appellee's bond.

Even if the March 23, 1964 shipment is found to be a last furnishing by the appellant, it is still not entitled to bring this action because its claim for $47,657.78 is for materials which were furnished before November 1, 1963, and for this reason the notice of June 12, 1964 is not timely because it is not within ninety days of the date upon which the materials, for which a Miller Act claim is made, were furnished.

ARGUMENT.

I.

In order for the appellant to have perfected its right to sue on the Miller Act bond, posted by the appellee as surety for Shiff, Section 270b(a) of that Act, 40 U.S.C., required the appellant to give written notice to Shiff "within ninety days from the date on which (appellant) did . . . furnish the last of the material for which . . . (a) claim (of nonpayment) is made." Furthermore, Section 270b(b), as amended, required the appellant to have commenced this suit before the "expiration of one year after the day on which the last of the . . . material was supplied by (it)." The satisfaction of these procedural requirements—of ninety day written notice and commencement of suit within one year of date of last furnishing—are "mandatory" and a strict condition precedent to the existence of any right of action, in the appellant, upon said bond. *United States for Use and Benefit of American Radiator & Standard Sanitary Corporation v. North-Western Engineering Co., et al.*, 122 F. 2d 600 (8th Cir., 1941); *United States for the Use and Benefit of Soda v. Montgomery, et al.*, 253 F. 2d 509 (3d Cir., 1958).

The sole issue in the instant case is whether or not the appellant has satisfied the procedural requirements of Section 270b. If it has not, then the foregoing authorities clearly show that, as a matter of law, the appellant does not have any rights under the Miller Act and, consequently, the disposal of appellant's action, based upon that Act, by Summary Judgment, was

proper. Did the appellant give written notice to Shiff within the ninety day period and did the appellant commence this action within the one year limitation?

It is to be first noted that there is no dispute as to the dates upon which written notice of nonpayment was given to Shiff by the appellant, nor is there a dispute as to the date upon which this action was commenced. These dates are June 12, 1964 and March 22, 1965, respectively (R. 78, 2). Furthermore, there is no dispute as to the fact that no later than October 31, 1963 the appellant had furnished all required materals to the project in the amount of $47,657.78, pursuant to its contract with Reeder, a subcontractor of Shiff (R. 77). This controversy centers solely around the date of March 23, 1964. Upon this date Commercial shipped, pursuant to an order from Shiff, certain replacement panels directly and C.O.D. to Shiff (R. 80, 81). This fact is not controverted. But, what is controverted, is appellant's contention that the affidavits, on file herein, present a genuine issue of material fact as to whether it was appellant who furnished these replacement panels in light of the fact they were shipped directly from Commercial to Shiff. The record does not disclose any furnishings of material by appellant between October 31, 1963 and March 23, 1964 (R. 114). If October 31, 1963 is held to be the date of last furnishing, then the notice of June 12, 1964 was not within the ninety day period, nor was this action commenced within the one year limitation, and the appellant is not entitled to sue, on appellee's bond, under the Miller Act. As the appellee will now show, what the appellant erroneously claims to be issues of material fact are, really, just issues of immaterial facts and

issues of law, which may be decided, and were properly decided, by the court below.

The facts and the legal issues involved in the instant case are analogous to the case of *United States of America for the Use of Bernard J. Weithman and Charles M. Weithman, a partnership, dba Weithman Masonry and Const. v. The Buckeye Union Casualty Company,* 207 Fed. Supp. 552 (1962) (USDCt. M.D. Ohio, E.D.). In that case, plaintiffs were subcontractors for Horace L. Lurie Inc. Lurie had a contract with the United States for the repair and alteration of a Post Office. Defendant posted the bond, required by Section 270a of the Miller Act, as surety for Lurie. The facts, as stipulated, disclosed that April 28, 1960 was the last date upon which the plaintiffs supplied labor or materials for the project. The action was filed on July 31, 1961. On August 15, 1960 Lurie hired one Cleo Miller "to repair . . . improper caulking . . ." on the work done by plaintiffs. Miller submitted a bill for such repair work directly to Lurie and was subsequently paid therefor.

The plaintiffs argued, during trial that the filing of its action on July 31, 1961 was timely.

> 'It (was) plaintiffs' contention that Lurie was obligated to make a demand that any improper work be repaired by the subcontractor rather than hire a third person to do so. Consequently, plaintiffs claim to be entitled to utilize the date upon which the 3d person completed his work, in determining the time from which the limitation period begins to run as against the plaintiffs."

The Court held that the plaintiffs were not entitled to recover judgment against the bond, and said,

> "Plaintiffs have cited no authority supporting the claim that the Miller Act limitation period should run from a date on which a 3d person did work in the nature of repairs on the same project which plaintiffs worked on."
>
> "The Court is of the opinion that the language of the last two words of Section 270b '*by him*' (emphasis added) refers back to 'the person suing' as set forth in that Section, and not to some other person. As plaintiffs are 'the person suing' their right to sue expired on April 28, 1961."

As can be seen, the facts of the *Weithman* case are almost identical to the undisputed material facts of the instant case in the following respects:

1. In the *Weithman* case, the plaintiffs themselves did not furnish any labor or materials after April 28, 1960. This date was more than one year before the date on which the plaintiffs filed their Miller Act suit-July 31, 1961.

In the instant case, it is clear that the plaintiff itself did not furnish any materials to the project after October 31, 1963 (R. 114). The date of October 31, 1963 was more than ninety days before the date on which the plaintiff served its notice of non-payment—July 12, 1964—and more than one year before the plaintiff filed its Miller Act suit—March 22, 1965.

2. In the *Weithman* case, the plaintiffs attempted to take advantage of the fact that certain repair work was done by a third party, under an independent service contract, in August of 1960. This date was not more

than one year before the filing date of plaintiffs suit and if plaintiffs had prevailed, they would have been entitled to judgment.

In the instant case, the appellant is also trying to take advantage of an independent contract between Shiff and Commercial by arguing that the replacement panels, which were shipped by Commercial, were really panels belonging to the appellant. Does the record, and do the authorities, support appellant's contention?

An analysis of the various affidavits disclose that:

(a) On March 17, 1964, a telephone call was made by Mr. Howard A. Shiff to "someone" in the office of the appellant. Appellee, in its supporting affidavits, claimed that this "someone" was a Mr. Joseph W. Kelly (R. 94-95, 97-98). Appellant, on the other hand, claims that Mr. Kelly was out of the country on that date and that this "someone", with whom Mr. Shiff spoke, was a Mr. Michael P. Beere, manager and now president of appellant R. 102). While appellee must admit that this is an issue of fact as to whether it was Mr. Kelly or Mr. Beere with whom Mr. Shiff spoke, it is appellee's contention that it is really just an issue of an immaterial fact. It is not really material to the issues of this case to determine whether it was Mr. Kelly or Mr. Beere who was contacted. What is material is that both parties admit that "someone" who was acting on behalf of appellant as its representative, and Mr. Beere admits to having been manager of the appellant at that time, was contacted by Shiff (R. 100).

(b) In the telephone conversation between Shiff and the representative from appellant on March 17, 1964, Shiff was told that Floating Floors would not furnish the replacement panels and that Shiff should proceed through Reeder. This is the only reasonable construction of the following pertinent part from Mr. Beere's affidavit. "Shiff's representative asked me to have Floating Floors furnish the required replacement panels and I suggested to him in reply that inasmuch as his sub-contract was with Reeder, he should initiate his request through that firm in accordance with customary practices in the industry . . ." (R. 102).

Thus, the undisputed material fact is that the appellant told Shiff to proceed through Reeder and not Floating Floors since Shiff's contract was with Reeder. Although the appellee claimed that the appellant "unqualifiedly" refused to ship the replacement panels to Shiff (R. 94-95, 97-98), the opposing contention of the appellant that it did not outrightly refuse to ship said panels (R. 103) does not give rise to an issue of mateial fact in light of the quote above, from Mr. Beere's affidavit. It is really immaterial whether the refusal to ship was "unqualified" or just by way of implication by telling Shiff to proceed through Reeder and not Floating Floors.

(c) On or about February 20, 1964, Mr. Beere called Commercial, in Maryland, and spoke with a Mr. Robert Jendrek, Commercial's vice president (R. 102, 110). At that time, Mr. Beere dictated to Mr. Jendrek a list—received by Mr. Beere from Shiff—of panels which would be needed to replace some defective panels installed at the project (R. 102, 111). After this con-

versation, Commercial proceeded to manufacture the replacement panels in accordance with said list (R. 111). From these facts, appellant claims that "(its) affidavits show that the replacement material had been manufactured by Commercial for appellant, was being held for appellant pending further instructions from appellant and that at the time it was furnished to Shiff, it was the property of appellant." (Appellant's Br. p. 11). The foregoing facts do not clearly establish the ultimate fact that the replacement panels were the property of the appellant and, even if we assume that they do, facts, not discussed by appellant, but which appear in appellant's affidavits, clearly negate any such conclusion.

The affidavit of Mr. Michael Beere shows that during the phone call to Commercial's Mr. Jendrek, on February 20, 1964, that after giving Mr. Jendrek the list of replacement panels which would be needed, Mr. Beere said "(I) told Mr. Jendrek that I expected Commercial Steel would be called upon to manufacture and furnish the replacement panels inasmuch as such panels were not readily available elsewhere." (R. 102). Furthermore, in that conversation, "Mr. Jendrek said that Commercial Steel would furnish the replacement panels at its own expense if it appeared to his satisfaction that the panels failed as a result of defects in the manufacture but not if the defects resulted from misuse or improper installation." (R. 101). And, "Mr. Beere stated that he would have to get more information about the statutes of the project in order to determine just how we could handle the problem and therefore to hold the new panels until we or Commercial Steel heard from him at Floating Floors. We thereupon proceeded to

manufacture the panels . . ." (R. 111). This problem to which Mr. Jendrek refers was the problem of determining whose responsibility it was to replace the defective panels inasmuch as Mr. Beere told Mr. Jendrek that because the floor system was being used and the defective panels we installed under machinery, Commercial would not have the opposrtunity to inspect these defective panels until the replacements were installed (R. 111). It is again noted that this opportunity to inspect was a condition to a furnishing of the replacements at Commercial's own expense (R. 101).

Thus, it can be seen from the foregoing analysis that on or about February 20, 1964 no contractual obligation for the furnishing of replacement panels was undertaken by appellant. The manufacturing of these panels, as the affidavits show, was not specifically for appellant, as claimed, but was done because Commercial knew it would be called upon to manufacture replacements and, if there was a manufacturing defect, it would have to furnish them at its own expense. If there was misuse or improper installation, Commercial would be paid by the responsible party. The manufacturing of these panels was for Commercial's inventory and not for the appellant or appellee since neither had admitted liability and neither had agreed to pay for them.

Even as late as March 17, 1964 the issue as to whose responsibility it was for the furnishing of these replacement panels had not been resolved (R. 103). Because appellant at no time had contracted for the manufacture of these panels, by admitting liability, ordering them and agreeing to pay for them, they were, on March 23, 1964, the date of shipment, the property of Commercial, and held in their inventory.

Appellant cites the case of *Southern Pacific Company v. Hyman-Michaels Company,* 63 Cal. App. 2d 757, 147 P. 2d 692 (1944) for the proposition that "Where title to goods lies, under the applicable California law, is a matter to be determined by the intentions of the party." (App. Br. p. 12). Without any discussion of this case by the appellant, the appellee is hard to put to see its relevance. That case was concerned with the issue of when does title to personal property pass to a purchaser under a valid contract of sale where the purchase price included the terms "transportation F.O.B." The case was concerned solely with the construction of a contract term. Once again, the appellant has misapplied a legal principle. The issue of whether the appellant or Commercial had the title to the replacement panels is not involved because the record does not show that the appellant had undertaken any contractual obligation for the purchasing of these panels (R. 114). Since the facts do not show that the appellant had entered into a contract, the panels were, at all times, the property of Commercial and, as a matter of course, the issue as to title, as in the *Southern Pacific* case where a valid contract existed, does not arise.

The case of *Gruber v. Wm. Coady and Co.,* 199 F. 2d 554, cited on page 12 of the appellant's brief, also does not lend support to the appellant's argument. In that case plaintiff sold, and shipped, meat to defendant "Chicago" who resold to the Navy Department. A purported assignment was made by "defendant Chicago" to defendant "Discount" of the right to receive the Navy payment. Plaintiff claimed that the check given to it by defendant "Chicago" was fraudulently issued because of NSF and therefore the assignment to

"Discount" by "Chicago" was the same as if made without consideration and was void. Thus, plaintiff claimed that title to the meat had not passed to "Chicago" because of the fraud, even though the meat had been shipped by the plaintiff. "Discount" claimed that plaintiff had agreed to accept an open check and for that reason title passed to "Chicago" and the assignment was valid and "Discount" was entitled to the money.

As can be seen, the *Gruber* case did involve numerous factual issues such as: (1) was "Chicago's" check fraudulently issued? (2) Did plaintiff agree to accept an open check? In the *Gruber* case the facts showed a contract for the sale of the meat existed between plaintiff and "Chicago". The issue of whether or not it was a valid contract was a legal issue which could only be resolved by making certain factual findings. In the instant case, as the appellee has shown in its discussion of the affidavits, there is no issue of material fact. The appellant has never claimed, nor do the facts show, that it had a contract for the purchase of the replacement panels. The replacement panels were shipped directly from Commercial to Shiff and were not shipped by the appellant.

The final authority cited by appellant as support for its first argument is the case of *United States for the Use and Benefit of P. A. Bourguin & Co., Inc. v. Chester Co., Inc., et al.,* 104 F. 2d 648 (2d Cir., 1939). The case is not "factually very similar" to the instant case, as the appellant contends (App. Br. p. 11). In that case, the plaintiff, a lathing subcontractor, left the jobsite on January 28. However, when plaintiff left the job at that time "(it had) completed all the work re-

quired under its subcontract except the framing and lathing for a cornice . . .", and "no detail plan for such cornice construction was furnished until about the middle of April." The necessary materials for the completion of the cornice work were left at the job site by plaintiff. Subsequently, in April of the same year, one Fitzgerald, one of the men working for the plastering subcontractor, completed the cornice work as an accommodation to the plaintiff and plaintiff was billed therefor.

In holding that the plaintiff performed labor, pursuant to its subcontract, in April, and that a Miller Act notice within ninety days of the April date was good, the court said that:

> "The foregoing evidence is sufficient to support a finding that in April (plaintiff) *through Fitzgerald* 'performed the last of the labor for which its claim was made.'" 104 F. 2d 648, 649.

That case is clearly distinguishable from the instant case for the following reasons:

1. In the former, the plaintiff had not completed its performance under its subcontract in January because the "detail plan" for the cornice work was not forthcoming until mid-April. In the instant case, the appellant had completed all of the furnishing of the materials, required by its subcontract with Reeder, by October 31, 1963 (R. 77).

2. In the former, the materials were left by the plaintiff and when the plan for the cornice was issued, the work under the subcontract was completed as an "accommodation" to the plaintiff. The plaintiff was billed for—and paid for—this "accommodation" work.

In the instant case, the facts show that the shipment, by Commercial, on March 23, 1964, was not an "accommodation" to the appellant for which it was billed, because as late as March 17, 1964 appellant had not admitted responsibility for the defective panels and had not agreed to pay for their replacement (R. 103).

3. In the former, the plaintiff was billed for the "accommodation" labor and subsequently paid for such labor. In the instant case, the billing for the replacement materials went directly to Shiff, and not the appellant, and was paid for by Shiff, and not the appellant (R. 80-82).

4. And, in the *Bourquin* case, the court found that the plaintiff had labored "through Fitzgerald" because the plaintiff had agreed to pay the "accommodation" labor charge. In the instant case, the court found that the appellant did not furnish the replacement panels "through" Commercial because, at no time, did the appellant undertake a contractual obligation to pay for them.

It is the appellee's contention that:

(1) Because the record shows that on March 17, 1964 the issue of the responsibility of replacing the defective panels had not been resolved (R. 103); (2) and because nowhere in the record does the appellant show that it had undertaken a contractual obligation to pay for these panels (R. 114); (3) and because the record does show that Shiff ordered the replacement panels, itself, directly from Commercial in March, 1964 (R. 111) and these panels were shipped directly to Shiff on C.O.D. terms (R. 80), and these panels were paid for by a certified check from Shiff to Commer-

cial (R. 82), there is no genuine issue of material facts whether these replacement panels were shipped by the appellant.

Therefore, it is the appellee's contention that: (1) Because the record indisputably establishes the fact that a separate contract for these replacement panels existed between Shiff and Commercial; (2) because the appellant

> "(has) cited no authority supporting the claim that the Miller Act limitation period should run from (the) date on which a third person (Commercial) did work in the nature of repairs on the same project which (appellant) worked on."

Weithman case, *supra*; (3) and, because the construction of the language of the two words "by him" (as set forth in Section 270b) offered by the *Weithman* court, that "the person suing" must be the one to have last furnished materials to the bonded project, is a reasonable and proper one, the District Court was correct in deciding that, as a matter of law,

> "use plaintiff forfeited its right to sue under the Miller Act, 40 U.S.C., Section 270b(a), by its failure to give notice of nonpayment within ninety days from the time it last furnished materials (October 31, 1963) . . ." (R. 113).

and was correct in granting a Summary Judgment in favor of the appellee.

II.

Even if this court decides that the foregoing analysis and application of authorities is improper, and decides that the furnishing of the replacement panels by Com-

mercial on March 23, 1964, was a furnishing by the appellant within the meaning of the Miller Act, the appellant is still not entitled to recover on the appellee's bond. The reason for this is that the appellant's notice on June 12, 1964 was not "within ninety days from the date on which (appellant) . . . furnished or supplied the last of the material for *which such claim is made* . . .", 40 U.S.C., Section 270b.

Appellant's claim is for $47,657.78 (R. 5). All of the materials for which such claim is made were furnished to the project by October 31, 1963 (R. 77). Furthermore, "appellant is owed no money for the replacement material, inasmuch as its supplier, Commercial, had been paid for it." (Appellant's Br. p. 18). Since the appellant, by its own admission, is not making a claim for the replacement materials furnished on March 23, 1964 — assuming that this was a furnishing by the appellant — it can only be concluded from the record that its claim is for the materials last furnished up to October 31, 1963. The notice of June 12, 1964 was more than ninety days from this date. How then can the appellant claim that there is a genuine issue of material facts as to whether or not its June 12, 1964 notice was timely?

On page 13 of its brief, appellant cites the case of *United States v. Gunnar I. Johnson & Son, Inc.*, 310 F. 2d 889 (8th Cir., 1962) as being "a case similar factually to the present case." Once again, the appellant claims that an authority is "factually similar" and then leaves this court and the appellee to be on their own to determine in what ways the case is similar to the present one. The appellee contends that said case is factually dissimilar and for that reason its point of

law is not applicable to the case at bar. While the facts of that case as cited are correct, the quote therefrom is materially incomplete and totally misleading. The following is an enlargement of said quote:

> "However, the stipulated facts do disclose that the bus duct elbows were component parts of the entire electrical equipment distribution system; that this system was engineered for this specific project; that said ducts were essential component parts without which the system was incomplete; that, at the time they were initially shipped on December 20, 1959, they were in such a defective or improperly prepared condition that they could not be installed in the system; and that they after being altered in order to meet the requirements for their installation into the system, they were reshipped from the factory to the job site on April 5, 1960 . . ." 310 F. 2d 899, 903.

The court then continued with the quote as found on pages 13-14 of the appellant's brief. After so holding, the court said:

> "Factually and in principle this case is readily distinguishable from those cases involving the performance of labor and supplying minor items of materials for the purpose of correcting defects, or making repairs following inspection of the project, and not performed or supplied as part of the original contract." 310 F. 2d 899, 903.

The *Johnson* case is factually distinguishable from the instant case for the following reasons:

1. In the former, the facts showed that the bus duct elbows were essential component parts without which the entire electrical system was incapable of func-

tioning. In the instant case, any given panel was not an essential part to the whole of the flooring system so that, without said panel, the flooring system could not be installed.

2. In the former, the original bus duct elbows shipped under the construction contract on December 20, 1959 were so defective that they could not be installed at the time of said shipment. The fact that installation of the system, and the beginning of its performance, was impossible without these component parts is what made the original contract incomplete. In the instant case, the entire flooring system was installed and was in active use (R. 111). It was only after the flooring system had begun to be used that certain panels were found to have "not held up" and were considered to be defective (R. 101). From these facts it must be concluded that, as of October 31, 1963, appellant had fully completed performance under its contract with Reeder because in appellant's letter to Shiff on March 27, 1964 it was claimed that as of October 31, 1963 appellant had furnished materials to the project which were of the value of $47,657.78, for which it had not been paid (R. 77). This amount is the same amount as that claimed to be due and owing to the appellant under its contract with Reeder (R. 4-5).

It is appellee's contention that, for the foregoing reasons, this case is not similar to the *Johnson* case but rather is similar to those cases which involve the supplying of materials for purposes of correcting defects which have been found after an inspection of the project. Therefore, as the *Johnson* court said, *supra*, this type of case is readily distinguishable, both in fact and principle, from the *Johnson* case.

The case of *United States of America for the Use and Benefit of Barney Austin v. Western Electric Co., et al.,* 337 F. 2d 568 (9th Cir., 1964), as cited by the appellant on pages 14-15 of its brief, is a correct summation of both the issues and principles therein involved. But, as appellant's quote shows, that case involved a material issue of fact because the complaint was filed on December 7, 1961 and, if no work was performed on December 7, 1960 or after, the complaint would have to, as a matter of law, be held to be not timely. The record was barren, on this material issue, of whether or not work was performed after December 6, 1960. In the instant case, there is no issue of fact as to when various furnishings of material took place. By October 31, 1963 the appellant had supplied all of the materials to the project for which it is making a claim (R. 77, 4-5). On March 23, 1964 Commercial shipped replacement materials to Shiff, C.O.D. and pursuant to a direct purchase order from Shiff, for which Commercial was paid by a certified check from Shiff (R. 111, 80-82). Appellee contends that what is involved here is not an issue of material fact, but rather an issue of law. This issue of law is: Given the facts surrounding the March 23, 1964 shipment from Commercial, as presented by the affidavits, was this a furnishing by the appellant?

Finally, in the case of *P. F. Scholes, Inc., et al. v. United States of America for the Use and Benefit of Lock Joint Pipe Company,* 297 F. 2d 337 (10th Cir., 1961), cited on pages 15-16 of the appellant's brief, the court said after the quote set forth on page 16 of appellant's brief:

> "Scholes earnestly contends, however, that this delivery was a special order for its own account,

> and that there was no competent evidence to support the trial court's conclusion that the order was placed pursuant to the Hardeman—Lock Joint contract."
>
> "Viewing these facts and the inferences fairly and reasonably to be drawn therefrom in the light most favorable to the appellant, we cannot say that it was clearly erroneous for the trial court to conclude that Lock Joint's delivery of the 198 feet of pipe was made pursuant to its contract with Hardeman and not pursuant to a special contractual relationship with Scholes." 297 F. 2d 337, 339.

This reasoning of the *Scholes* court is also very apropos to the instant case because the affidavits, as previously shown by the appellee, clearly support the District Court's conclusion that the facts do not show that the March 23, 1964 shipment was pursuant to the Reeder-Floating Floors contract—but was rather pursuant to a special contract between Shiff and Commercial. Appellee contends that because the facts show that: (1) nowhere in the record does the appellant show that it had undertaken a contractual obligation to pay for the replacement panels (R. 114); (2) the March 23, 1964 shipment was made pursuant to a direct purchase order from Shiff to Commercial (R. 111), was made on C.O.D. terms (R. 80) and was paid for by a certified check from Shiff to Commercial (R. 82), the only reasonable conclusion which can be drawn from the record is that a special contract existed between Shiff and Commercial and for this reason the holding of the *Scholes* case is not applicable to the case at bar.

Appellee contends that, if we assume that the March 23, 1964 shipment was a furnishing by the ap-

pellant, the principle announced in *United States for Use of McGregor Architectural Iron Co. v. Merritt-Chapman & Scott Corp.*, 188 Fed. Supp. 381 (D.C. Pa., 1960) is applicable.

> "Under ninety day notice provisions of this section (270b), where last labor was performed and last supplies were furnished by third subcontractor for work on signal corps depot during early part of 1954, although third subcontractor corrected errors such as missing bolts and failure to close holes without charge in June, 1955, notice by third subcontractor to prime contractor by registered mail in June 1955 demanding payment balance due was not timely, and third subcontractor could not recover prime contractor's payment bond."

In the instant case, the last materials for work on the project were furnished by the appellant by October 31, 1963 (R. 77). Even if we assume that the appellant furnished some replacement panels in March, 1964, this furnishing was in the nature of repairs or correction of "errors" and the notice of June 12, 1964 was not timely.

Thus, it is the appellee's final argument that even if this court finds that the record shows that the appellant furnished materials to Shiff on March 23, 1964, or at the very least there is an issue of fact as to said furnishing, the appellant is still not entitled to recover on the payment bond because it has failed to satisfy a procedural requirement, to wit, the notice of June 12, 1964 was not within ninety days from the date when the appellant last furnished materials for which its claim is being made. Appellant is claiming only for those materials furnished, at the very latest, on October

31, 1963 (R. 77, 4-5). And this case, being factually dissimilar, is not within the rule of *United States v. Gunnar I. Johnson & Son, Inc., supra.*

III.

Even though "the Miller Act is highly remedial in character and is entitled to a liberal construction and application . . .", *United States v. Dickstein,* 157 Fed. Supp. 126 (D.C.), it stands to reason that a liberal construction and application of that Act, to a given set of facts, can only take place after it has been clearly shown that a party claiming the benefit of that Act is entitled to claim such a benefit.

As the appellee has shown, by its foregoing authorities and analysis of the affidavits, the appellant had not made a last furnishing of materials on March 23, 1964, nor is the appellant making any claim for materials furnished after October 31, 1963 (R. 77, 4-5). Therefore, because the notice of June 12, 1964 was not within ninety days after the last furnishing for which the appellant's claim is made, the appellant's notice was not timely. Because the appellant's notice was not timely, the strict condition precedent to the existence of any right to sue on the bond had not been satisfied. *United States for Use and Benefit of American Radiator & Standard Sanitary Corporation v. North-Western Engineering Co., et al.,* 122 F. 2d 600 (8th Cir., 1941); *United States for the Use and Benefit of Soda v. Montgomery, et al.,* 253 F. 2d 509 (3d Cir., 1958). And, because there is no existence, in the appellant, of any rights under the Miller Act, it cannot be liberally construed or applied to the instant case as appellants contend.

Furthermore, the liberal construction and application to which the court in *United States v. Endebrock-White Company,* 275 F. 2d 57 (4th Cir., 1960) was referring was not with regard to the satisfaction of the procedural requirements of timely notice and commencement of an action, but were rather with regard to the burden of proof required to succeed in a Miller Act suit.

> "We hold that, in order to recover under the Miller Act, it is not required of the materialman that he prove that his materials were 'actually used' in the prosecution of the work of the prime contract, but only that in good faith he reasonably relieved that the materials were so intended." 257 F. 2d 57, 60.

And, quoting from *United States v. Dickstein, supra,* the court said:

> "The Miller Act is highly remedial in character and is entitled to a liberal construction and application in order properly to effectuate the congressional intent to protect those who furnish labor or materials for public works." (Cites omitted). "In accord with this policy, and in view of the reasons discussed above, it is the opinion of this court that as against the prime contractor a materialman may recover under the Miller Act where he has sold and delivered material to the subcontractor in good faith and under the reasonable belief that it was intended for ultimate use under the prime contract. Neither delivery of the material to the prime contract job site nor actual incorporation of the material into the work is required." 257 F. 2d 57, 60.

As has been previously shown, it was Commercial, and not the appellant, who sold the replacement panels to Shiff pursuant to a direct purchase order and on terms of C.O.D., which were complied with by Shiff.

CONCLUSION.

The judgment of the District Court should be affirmed for the reasons that the genuine material facts, as presented by the various affidavits, are undisputed and, from these undisputed facts, as a matter of law, the appellant is not entitled to any relief under the Miller Act because its notice of June 12, 1964 has failed to satisfy the condition precedent—of timeliness—as set forth in Section 270b.

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Certificate of Counsel.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

SCOTT SIMON